DAVISON, C. S.

Letters on the "Proposed" Fisheries Treaty of 1888.

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LETTERS

ON THE

"PROPOSED"

FISHERIES TREATY

OF

1888

BY

CHARLES STEWART DAVISON

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"TERRITORIAL WATERS" IN THE FISHERIES TREATY.

MARCH 1st, 1888.

Sir: The publication some days since of the text of the proposed new Fisheries Treaty between the United States and her Britannic Majesty has not only turned public attention toward the general subject, but has led also to a more or less extended discussion of the underlying reasons for the appearance in it of various elements which enter into the treaty as constituent parts, much of which discussion is unintelligent for want of popular familiarity with elementary international rules.

Without undertaking, then, to say whether, in a broader, and therefore more peaceful civilization, occasion for any such treaty would arise or utility be found in it, and without undertaking to argue the necessity, even at the present time, for the rules therein laid down, or whether they are in accordance with natural equity and justice, I desire to submit some elementary matters which bear upon the strict right of Great Britain to require certain of the conditions and limitations therein set forth.

Your readers have doubtless noticed that appended to the proposed treaty is a memorandum of a modus vivendi to be operative ad interim. More careful readers have also noticed that the fourth article thereof reads as follows: "Forfeiture to be exacted only for the offences of fishing or preparing to fish in territorial waters;" without the slightest attempt either in that or any other of its articles to define or specify what is intended by the term "territorial waters." A moment's thought, however, leads to the conclusion that the same spaces are intended as those delimited in the proposed treaty itself to which the temporary expedient is appended. The question then arises, how do these come to be "territorial waters," and what rights can be successfully asserted therein by Great Britain? Also, some assertions are made, based on a natural repugnance to being controlled in or limited as to what seems a right common to all, the privilege to fish in the sea, to the effect that it is a virtual surrender of the rights of its citizens, on the part of the United States, to acquiesce in the prohibition to them from fishing in these "forbidden waters." It is nevertheless the fact not only that under international rules as they now stand Great Britain is authorized to make this demand of us, but also that we have ever asserted rights which would permit a similar claim on our part. And it is also the fact that the definition of the territorial waters provided for in the treaty are singularly moderate in comparison with those Great Britain might have claimed, and that, as compared with claims resting on a similitude of reasoning which have been advanced by ourselves in the past, they are insignificant. Speaking generally, they amount to a claim of ownership (with its incident, the exclusive right to fish) in the waters adjacent to the coast for the space of three marine miles (the "maritime league") outward from the coast, the coast line being taken at every indentation as being a right line across such indentation at the most outwardly point where the shores approach within ten marine miles. In regard to certain mentioned bays and sounds (only ten in number for the entire coasts of the British possessions), larger areas than the above are cut off by specifying certain points from and between which the basic line of the marine league shall run. But vast expanses of water which might be claimed under a rigid interpretation of international rules are excluded, and, as it appears, valuable privileges which might have been jealously retained are given up. Indeed, the use of the words "territorial waters" in connection with the limits assigned is of itself a narrowing of claims which augurs a distinct spirit of concession for the future.

What the "territorial waters" of a State are, and what the extent of the rights of the sovereign power therein, have been fairly well defined heretofore. The first and universally acquiesced-in rule is that of a marine league outward from the coast line.

As a matter of mere passing interest, it may be noted that the reason for the fixing of three miles as the extent of the territorial sea (without regard to the point from which the three miles shall begin to be meas-

ured) appears in several writers, but at the same time it has by the improvement in the implements of warfare effected in latter years ceased to be a controlling reason. Azuni in his maritime law (vide the translation of W. T. Johnson, N. Y., 1806), part i., ch. 2, art. 2, "Of the Extent of a Territorial Sea," section 15, says: "The most certain mode of fixing the extent of the territorial sea as to coasts not curved is to limit it to the space passed over by a ball shot from a cannon, or at the point from which a bomb shot from a mortar placed on the shore may strike a vessel. . . . It would be reasonable, then, in my opinion, without inquiring whether the nation in possession of the territory has a castle or battery erected in the open sea, to determine definitively that the jurisdiction of the territorial sea shall extend no further than three miles from the land, which is without dispute the greatest distance to which the force of gunpowder can carry a ball or bomb." And he cites a verse from the anonymous poem, "Del Diritto Della Natura," lib. 5, which the translator gives in the original as well as the following faithful rendering:

> Far as the sovereign can defend his sway
> Extends his empire o'er the watery way;
> The shot sent thundering to the liquid plain
> Assigns the limits of his just domain.

Woolsey (infra) says: "As the range of cannon is increasing, it might be thought that the sea line of territory ought to widen, but the point is not likely to become one of great importance," as to which conclusion one might reasonably differ; and Bynkershoek, De domin. mare, ch 2, says: "Terrae potestas finitur armorum vis," and again, "Quousque tormenta exploduntur."

Be this as it may, it is now a matter of universal concession that the adjacent State should claim a marine league as territorial waters in the strict sense of the word. More extensive claims have been advanced in the past by several maritime nations, notably by Great Britain, and more lately by the United States, though such extended claims have been refuted by the civilians. For those curious in such matters the learned treatise of Grotius (Mare Liberum), and the narrower attempted answer by Seldon, the Mare Clausum, will be of interest, and Bynkershoek (Tom. 11, 124), Puffendorf (11.5, sections 5-10), Vattel (1, chap. 3), Chitty (Commercial Law 1, 88-102) all discuss the extent of the attributable dominion over "close and narrow seas." Seldon, whose claims for Great Britain were so extravagant as to be practically self-refuting in argument, laid claim to a dominion over "the four seas" (surrounding the British Isles) up to the coasts of the adjacent countries. At home, though one would perhaps preferably suspect Mr. Monroe, our Moses in this matter appears to have been Mr. Madison, and his letters to Mr. Monroe and Mr. Pinckney lay claim to an extravagance of dominion (see extract below) which seems hardly supportable. As to the rights which a nation can justly claim in its "territorial waters," it would seem that they are commensurate with those which it can claim in and over its actual territory. Angell, in his work on tidewaters (Boston, 1826), says: "To the king therefore is not only assigned the sovereign dominion over the sea adjoining the coasts and over the arms of the sea, but in him is also vested the right of property in the soil thereof," the author having immediately theretofore said: "Indeed, in England the King is regarded as the universal occupant, and the presumption is that all property was originally in the crown."

And Sergeant Callis in his learned work says: "Touching our mare anglicum in whom the interest is and by what law the Government thereof is; the King hath therein these powers and properties: (1.) Imperium regali. (2.) Potestatum legalem. (3.) Proprietatum tam soli quam aquae. (4.) Possessionem et proficuum tam reale quam personale."

Gould, in his "Treatise on the Law of Waters" (Chicago, 1883), sums up a large number of authorities and discussions, and adds other citations from various writers, which I do not trouble you with, and coincides in the opinion of Cousin and Forbes, who, in their work on waters ("Sea, Tidal and Inland," London, 1880), discuss the question somewhat at large and cite at length the interesting case of Regina vs. Keyn,, 2 Ex. Div. 63; in the opinion in which case we find used (to define these waters and the rights of the adjacent State therein) the following language: "Termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our (i. e., British) statutes denoting that this belt of sea is under the exclusive dominion of the State."

The dominion of "the King" in the territorial waters, as in the soil of the State itself, is, of course, only a convenient fiction or method of expressing the ownership of the State (with us, of the people) therein, and it naturally follows that all rights and privileges appurtenant to either the use, occupation, or dominion over land or territorial sea reside

also in the King, State, or people (according to the form of government). The common privileges appurtenant to the ownership of any portion of the sea are fishing, navigation, and wrecks, and these have been treated from early times as public rights appurtenant to the crown, as such, rather than private rights of the individual sovereign, and as such they cannot be granted away or otherwise disposed of by the sovereign. Certain particular species of fish have been in England held to be royal fish, such as whales, porpoises, and sturgeon, one-half going to the King; but this arrogation is of little practical importance.

The case of Blundell vs. Catterall, 5 Barn. and Ald., 91, deals very clearly with many of these points, and sustains the rights of the public derived from the public right of the crown as against the theory of the private rights of the Crown, so far as navigation and fishing are concerned.

Of course, in regard to wrecks, as civilization advanced, the principle of returning the wreck or its proceeds to its true owners became universally established (in 1376 in England they had to "come within a year and a day"), and this branch of the subject ceased to be an important one; and see, as to the question of dominion generally over the narrow seas, the treatise attributed to Sir Matthew Hale (Harg. Tracts, De Dom. Mar. and De Portibus). In France an ordinance of the sea laws of Louis IV., section 47, disposes of the question of the nature of the King's right in fisheries by declaring fishing in the sea to be free and common to all the subjects of the kingdom.

The main use on the part of the Crown of the right of dominion over arms of the sea and other places where the tide ebbs and flows, is to prevent the interruption or obstruction of navigation by the public, which, indeed, cannot be interrupted in England by the sovereign himself, though it would seem as though some of the special acts for the construction of bridges which have been passed latterly by Congress trenched upon this principle, and the absolute necessity of this right of dominion in the State for the benefit of its subjects or citizens is very well exemplified by this necessity of having the power to protect navigation by the public, resident in the State itself. It would seem then that in view of the present state of the law it should be scarcely cause of complaint on our part that Great Britain should protect within the maritime league the common but exclusive right of her subjects to the fisheries.

It may be noted that for certain special and less exclusive rights a wider control than the maritime league is considered not improperly assertable. For example, for the purposes of the proper enforcement and collection of revenue laws and customs duties, an instance of which is found in the so-called "Hovering Act" (9 Geo. II., ch. 35), prohibiting the trans-shipment of foreign goods within four leagues of the coast without payment of dues, and section 2,760 of the latest edition (1878) of the Revised Statutes of the United States (being the act of March 2, 1799, c. 22, s. 99, v. i., p. 700), provides for the boarding of inbound vessels anywhere within four leagues of our coasts by the revenue officers. And the Supreme Court of the United States (in the case of Church vs. Hubbard, 2 Cranch, 187) has declared the exercise of such jurisdiction conformable to international law.

As to the measuring of the maritime league outward from a straight line drawn across from headland to headland, and as to whether Great Britain, in limiting the points at which such right line shall cross indentations of the coast to such points as are within ten marine miles of each other (except as above mentioned in ten particular cases, where larger spaces are inclosed), it should be noted that the claim to this incident to the maritime league is as old as the claim to the maritime league itself, if not older. Practically the only question it is useful to here discuss is, whether Great Britain in the proposed treaty has been moderate or exorbitant in adopting this ten-mile rule to cover the majority of cases. Such recesses have been known from early times in England as the "King's chambers." They are those parts of the sea cut off by lines drawn from promonotory to promonotory. The term will be found used with this definition in a royal declaration published during the reign of Charles II., and within those places England has ever claimed exclusive jurisdiction. The United States have claimed the same jurisdiction, and have used the same term, "chambers"—for instance, in Mr. Madison's letter to Messrs. Monroe and Pinckney (mentioned above), dated May 17, 1806, American State Papers, vol. vi., pages 236 to 244, Mr. Madison denies the right to exercise belligerent rights near our coasts within "the 'chambers' formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another." And a reference to American State Papers, vol. i., pages 72-76, letter of Secretary of State to French Minister (15th May, 1793), and Op. Atty-Gen. of the United States 14th May, 1793, re the

ship Grange, and Mr. Jefferson's letter to Mr. Genet, November 8, 1793 (Jeff. Mem., vol. ii., page 302), will show that we have contended for the right to exercise our maritime jurisdiction for purposes of revenue and defence over such spaces of water on our coasts, and even over such as are included within lines drawn from Cape Ann to Cape Cod, from Nantucket to Montauk, from thence to the Delaware, and from Florida to the Mississippi, and we would probably have claimed that such last line should run from the southern point of Florida to the Rio Grande had that latter point been at that time within our territory. Mr. Abdy, an English writer, in speaking of these claims of the United States, says (in 1886): "There can be but little doubt that the more the United States advance in commerce and naval strength, the more will their Government be disposed to acknowledge the justice and policy of the claim of the British Empire to supremacy over the narrow seas adjacent to the British Isles, because they (we) will stand in need of similar accommodation and means of security."

Woolsey (International Law, sec. 56, sub-div. 1) says, "Bays of the sea, called in England the 'King's chambers' are within the jurisdiction of the States to whose territory they belong."

Halleck (International Law and Laws of War, San Francisco, 1861) says in ch. vi., sec. 16, "The exclusive right of dominion and territorial jurisdiction of the British Crown have immemorially extended to the bays or portions of the seas cut off by lines drawn from one promonotory to another along the coasts of the Island of Great Britain, there commonly called the 'King's chambers.' "

Wheaton in his work on international law undoubtedly sustains the same views, though I am unable to cite page and verse, not having a volume handy.

The maritime league, then, is to be measured outward from such right line from headland to headland, and, in view of these our extensive claims in the past, it would seem not unfair to admit on the part of Great Britain a conciliatory spirit in only including bays and estuaries of a width of ten marine miles. For the ten bays or sounds where a longer distance is specified, an examination of the map will show in each case that from the peculiar configuration of the land the claim is most reasonable, and in one instance (Placentia Bay) they do not even attempt to draw the line across the mouth of the sound, but at a point well within the headlands. Yours very respectfully,

CHAS. STEWART DAVISON.

THE FISHERIES TREATY.

The Broken Link Between 1789 and the Present Time (1888).

March 13, 1888.

Sir: Permit me some further considerations concerning other provisions of the new Fisheries Treaty, in regard to which I think that a widespread misunderstanding exists.

Assuming that my previous letter demonstrated our exclusion from the fisheries within the waters specified to be in accordance with the rules of international law, there remain certain provisions hampering convenient prosecution of fishing within waters lying without those limits, but adjacent to the British possessions. Examination of the provisions of our treaties with Great Britain since the provisional articles of 1782 down to this last treaty is instructive as a preliminary. Article 3 of that earliest result of diplomatic relations between the countries deals with the fisheries most favorably to our interests. It provides that we shall "continue to enjoy the right to fish on the banks and in the Gulf of St. Lawrence and at all other places in the sea where the inhabitants of both countries used at any time" theretofore to fish. Also "liberty" is granted "to fish on such part of the coast of Newfoundland as British fishermen shall use" and "on the coasts, bays, and creeks of all other" British dominions in America, and to dry and cure fish in any unsettled bay, etc., so long as it remains unsettled and after settlement on agreement with the inhabitants, etc. This article was incorporated into the Treaty of 1783, which resulted from the provisional articles and the subsequent conclusion of peace between Great Britain and France. The peculiar relations which the United States and its national existence bear to Great Britain are here evidenced.. We were not a previously existent, independent nation, entering into a treaty of peace and amity, but were then trafficking with the parent nation for such most desirable conditions as we might gain, with which to begin our career, in addition to the rights flowing from an independent sovereignty, as to which we needed mere acknowledgment. In respect to fisheries we gained most extensive and valuable rights, which probably were granted to us only for want of their importance being appreciated. That they should have been demanded at all, and that they should have been granted, could arise only from our having exercised them theretofore as a portion of the advantages which flowed to us as common subjects of the British Crown with those inhabiting the more northerly portions of the continent. Indeed, it is an extraordinary instance of a successful rejection of the burdens, and a retention of at least some of the advantages of an existent relation, which reflects credit on the ability and perspicacity of Messrs. Adams, Franklin, Jay, and Laurens, who acted on behalf of the United States. Angell (Tide Waters) falls into error in saying that by that treaty "neither nation" has "a right to fish in the waters of the other." Whether these advantages have been since lost or surrendered, and if so when, is a matter of deep interest to-day in view of the attack which is being made upon the present State Department. It is fair to premise that from their presence in the treaty they were admittedly matters of privilege, without the specification of which they would not have existed.

The next treaty dealing with the fisheries is the convention of 1818. The Treaty of Amity, etc. (1794-1796) does not speak of fisheries. But in the third article the right to exclude vessels of the United States from the "sea-ports, harbors, or creeks of his Majesty's said territories" (i. e., on the continent of America) is expressly conceded. The same article provides, however, for free importation by us, subject to usual duties, of all goods whose importation was not entirely prohibited. Whether this could be held to include fresh fish caught at sea does not appear to have been matter of discussion, and such construction was doubtless not contemplated by either party. Also in that treaty (1794) it is matter of concession that American vessels seeking shelter in any British port into which they could not ordinarily claim admission shall, on manifesting that necessity, be permitted to refit, etc., but not to either break bulk or unload cargo unless necessary to such refitting. The convention of 1802 does not deal with the fisheries, and the Treaty of Peace of 1814 is also silent on the subject. But it is at this point, chronologically speaking, that the main discussion arises.

A war had taken place between the nations, and a new treaty of peace on its termination was made, followed by a convention to regulate commerce (1815), which also does not deal with the fisheries. It was claimed on our part, especially with reference to the fisheries, that the war had merely suspended during its continuance, not abrogated, the provisions of the Treaty of 1783, while the reverse was contended by Great Britain. A treaty differs but little from other contracts in regard to construction and the reasoning to be applied. Many contain stipulations made expressly in contemplation of a possible war to regulate the conduct of the parties therein. It would be an abandonment of every principle of right to deny that such provisions remained in force during the very contingency to provide a rule for which they were framed. Likewise a provision inserted to provide a general rule for all future relations between nations must be unquestionably admitted to be neither rescinded by an intervening war nor subject to be abrogated by either nation. The only manner in which such provision ceases to be operative (excluding cases of its suspension during cessation of intercourse arising from hostilities) is by mutual consent, express or implied from affirmative clauses in further conventions. It is, however, permissible for one party to abrogate a treaty (by enactment) in the event of willful neglect or violation of its provisions by the other, coupled with refusal of reparation. A striking instance of which is found in the Act of Congress of July 13, 1788, abrogating our then existing treaties with France. But this would seem a remedy of doubtful utility, for application only in extreme cases and tending to impair the security and advantages afforded by the rules of international comity, almost without equivalent gain. It would seem, then (unless circumstances attendant on the war of 1812 or its results supply controlling reason to the contrary, which is not the fact), that article 3 of the Treaty of 1783, being intended to provide for the rights of the parties during the indefinite future, created an obligation not dissolved or annulled by the subsequent state of war, and it should be held to have ipso facto revived on the Treaty of Peace of 1814, which contained no repugnant article and did not expressly waive it. Our contention, therefore, that this provision was merely suspended, appears well founded.

The convention of 1815, as before observed, did not deal with the fisheries. The fisheries being then (in 1818) undoubtedly regulated only by the Treaty of 1783, its provisions in this respect being still operative, there remains only one question in regard to our exact measure of right at the time of the convention of 1818. Did the grant of the privilege "to take fish . . . on the coasts, bays, and creeks" mean without or within the maritime league? The expression "coasts, bays, and creeks," it seems clear, includes the territorial waters. Hallock, following Wheaton, speaks of "coasts" as not even "properly comprehending all the shoals which form sunken continuaions of the land perpetually covered with water," but only "all the natural appendages of the territory which rise out of the water," whether "mud or solid rock," and he cites Wheaton, Ortolan, Wildman, Pistoye et Duverde, and "The Anna." Woolsey, speaking of the maritime league itself, calls it the "coast-sea." Cousin and Forbes (the last English writers) apply the term "coast" to lands lying within the seashore, saying, "A grant, therefore, of a seacoast manor does not necessarily include the foreshore, though it may do so;" while Gould (on Waters) says, "The term 'coast' or seacoast appears to have no fixed meaning apart from the context, and to be equally applicable to the space between high and low water mark, or to the territory bordering on the sea which adjoins the land." Also Sergt. Callis defines the coast as always being land. While, therefore, the expression "coast" is indeterminate (and admitting that the expression "on the coast" implies rather adjacent waters than the land itself, especially when used in connection with the taking of fish) it would follow that the specification of "bays and creeks," being bodies of water that lie within the land, in connection with the term "on the coasts," contemplated the prosecution of the fisheries within the maritime league, as well as without its limits.

The convention of 1818 dealt with the question of fisheries in specific terms. They had become important, and Great Britain had been striving to curtail the rights we had acquired by adopting the policy of denying their continued existence since the war. It resulted that an adjustment of this controversy was entered into, and, whether we made concessions or merely defined our rights, whether we gained or lost: by the result of the negotiations we are bound—to wit, by the terms of the convention of 1818. The first article deals with this subject. It recites the arising of differences, and it agrees that we shall have for ever the liberty to take fish within the maritime league on the coasts of Newfoundland from Cape Ray to Rameau Islands on the one hand, and to the Quirpon Islands on the other, on the shores of the Magdalen Isl-

ands, and on the coasts, bays, and creeks of the southern coast of Labrador from Mount Joly to and through the Straits of Belle Isle, and thence indefinitely northward (except where the Hudson Bay Company had exclusive rights). Also that we should have liberty for ever to dry and cure fish in any unsettled bays, etc., of the particular coasts mentioned, and after their settlement on agreement with the inhabitants of such settled shores. But we, in the same article, renounced for ever any liberty theretofore enjoyed to take, dry, or cure fish within a maritime league of any other of the coasts, bays, creeks, or harbors of the British possessions in America not included within those limits. It was granted to us by proviso that for the purpose of shelter, repairing damages, purchasing wood and obtaining water, and for no other purpose whatsoever, prohibited bays or creeks might be entered, subject to restrictions necessary to prevent abuse of the privilege.

If, then, there has been any surrender of our original rights, as undoubtedly there has been, it took place in 1818, under President Monroe, rather than to-day, by our present State Department; for it was the principle that it was a matter of negotiation and settlement, and not of right inherent in the accepted conditions which accompanied the creation of our separate national existence, which was then conceded. Having conceded the principle, we succeeded in retaining but a small portion of the extent of our coastwise rights. Also, our right to enter then settled bays or harbors was expressly limited to entry for the purposes of shelter, etc. The further treaties with Great Britain down to 1854 do not deal with this subject. The first article of that treaty (1854), however, gave us important rights. Reciting the desire to avoid further misunderstanding, it provided that, in addition to the liberties mentioned in the convention of 1818, we should have liberty to take fish "on the sea coasts and in the bays, harbors, and creeks of Canada, Nova Scotia, and Prince Edward's Island," and the several islands thereunto adjacent, without any restriction as to distance from the shore, and and "with permission to land upon the coasts and the islands thereof, and also upon the Magdalen Islands for the purpose of drying nets and curing fish;" the shad and salmon fisheries in rivers and their mouths only being expressly reserved for British fishermen. In exchange we gave (by article 2) the right to take fish on the eastern sea coast and shores of the United States north of the thirty-sixth parallel of north latitude, and in the bays, harbors, and creeks of such coasts and shores, without restrictions as to distance, and with like permission to land to dry nets and cure fish. The fifth article provides for termination on a twelve months' notice, such notice to be given after ten years from the treaty's going into operation.

We gave such notice March 17, 1865, and the treaty terminated March 17, 1866. Thereby we relinquished the gain we had made over the Treaty of 1818. The other treaties and conventions down to 1870 do not deal with this question. In 1871 the "Alabama Claims" Treaty took up the question, restoring (in article 18) the provisions of the Treaty of 1854, and also taking away reciprocally all duties on fish and fish oil (excepting inland lake fish and fish preserved in oil), and it provided (article 32) for the famous Commission to settle the compensation, if any, which we should pay for the privileges therein accorded. Article 33 provided for a ten-year life for these fisheries regulations and a two years' notice thereafter of desire to terminate. These provisions went into effect July 1, 1873 (protocol of June 7, 1873), as to all portions of the British dominions except Newfoundland, and as to Newfoundland June 1, 1874 (protocol of May 28, 1875), Whether the rights secured by the Treaty of '71 were valuable or not it is useless at the moment to inquire. We voluntarily abandoned them, and are thrown back on the provisions of the Treaty of 1818 or on such new convention as we may by mutual consent enter into with England. But from this review of the treaties dealing with the fisheries question, it is apparent that we have fully committed ourselves by a long course of contractural relations to the proposition, which we first conceded in 1818, that we had no inherent right of fishery or of curing or drying fish within the "territorial waters" or on the coasts of the British possessions, and that such rights as we might acquire were matter of contract or mutual consent and not of inherent right.

The further question subdivides itself into (1) the simple question of fact, whether the privileges of the Treaty of 1818 are more extensive and valuable than those given by the proposed treaty; and therefore, whether this is a further surrender of existent rights by us, and if so, whether we are to gain any counterbalancing advantages which would compensate us therefor; and (2) whether any of the regulations inserted in the proposed treaty by Great Britain are in excess of the (so-called) "police regulations" which a State is entitled to promulgate to preserve its autonomy or the rights of its citizens or subjects, or to pro-

tect the appurtenances of its domain. With your assent, I would reserve these points for future discussion, merely adding that the fishery clauses in our treaties of 1800 with France, of 1852 with Holland, and of 1853 with the two Sicilies, all bear internal evidence supporting certain of the constructions above contended for. Very respectfully,

CHAS. STEWART DAVISON.

THE DETAILS OF THE FISHERIES TREATY.

April 4, 1888.

Sir: Before taking up the remaining points of public interest in regard to the Fisheries Treaty, discussion of which was reserved in my second letter, I desire to notice briefly a communication from Mr. Walker Blaine, which has appeared since then in the Tribunte (March 19). He sustains several of the points I made, viz.: (1.) That President Monroe's Administration bears the responsibility for present conditions, calling it "the disastrous and for ever inexplicable Treaty of 1818." (2.) That we as an independent nation have no inherent right of fishery within the marittime league, saying that we owe Article III. of the Treaty of 1783 to the diplomatic ability of Franklin, who "at a critical juncture in the negotiation played the British desire for compensation to the loyalists against concession of fishery rights." It was therefore matter of barter even then. Also he defines Article III. (Treaty of 1783) as being "an executed grant, imposing a perpetual servitude." Reliance on a "grant" negatives belief in an inherent right. I doubt, however, if in reality he intends to convey the impression that in his opinion it was a "grant," for just previously he approvingly says: "The American representatives" (Clay and Adams) "maintained that the language of the Treaty of 1783 showed that the right to take fish . . . was not created by that instrument, but was recognized by it as one already existing," etc. The true construction of the treaty can be arrived at by giving due weight to the extrinsic and unique circumstances which attended its making; that we were then starting a national existence. That construction is, that not alone Article III., but every clause it contains was in the nature of a "grant," but once recited they each and all became definitions of the dominion and empire respectively of this then created and youngest of the family of nations. (3.) He grants that the logical advantages of our former position have been abandoned, and that negotiation is necessary to-day, saying: "Had this provision . . . remained from that time to this in force . . . the fisheries question would have been finally set at rest." (4.) He shows that in 1814 we paved the way for our subsequent concession (in 1818) by electing to leave the question of abrogation or revival of Article III. in abeyance as an offset to Great Britains similar course regarding its claims to free navigation of the Mississippi.

He finally assumes two general sources of the subsequent difficulties. (1.) The occurrence since 1818 of a double change by mackerel as to their places of resort. This, he intimates, has made us take quite different views at different times of our rights. If, then, we have been "hoist with our own petard," while it may account for a part, at least, of our wrath, perhaps we had better say as little about it as possible. (2.) "The illogical and preposterous headland theory." If my first letter has not negatived the applicability of these adjectives to the headland theory, I am unable to do it, but I would call attention to whither such a theory as he appears to advocate would lead. It would surely be bad policy to insist upon rules which, being applied to another state of facts, would inure to our disadvantage, and if we destroy existent rules, founded on the experience of nations in their relations with each other, we can but expect to be surprised and dissatisfied with unforeseen results arising from their absence. If the headland theory be illogical and preposterous, it follows that Russian privateers may make prize of Canadian fishing boats within the hook of Cape Cod, while English cruisers chase Dutch merchantmen through the Vineyard Sound, and capture them in Buzzard's Bay, and Spanish fleets establish permanent cruising stations between Block Island and Point Judith. It is hardly fair for Mr. W. Blaine to dismiss the question as to the reasonableness of more extended basic lines for the maritime league in the special cases in the proposed treaty by saying that it would require more accurate charts than are now accessible to determine the benefit or the injury to the United States worked thereby, since any ordinary atlas will show the peculiar configuration of the coast line in each instance.

As to his proposed remedies; they are: To reject the Treaty of 1818 as a basis for negotiation, and accept nothing but such conditions as are found in the Treaties of 1783 and 1854; failing which, he says, negotiation is not among the "many ways" by which a solution of difficulties may be reached, and he specifies "punition" and "persuasion" as two of these many ways. Persuasion means negotiation ably conducted; punition means war. We would not be justified in depriving another nation of all business relations because she refused to grant us advantages, at the expense of her own citizens, in a valuable privilege belonging of right to them exclusively; and such action on our part, logically carried out, would ultimately lead to war. Persuasion, as he says, "through means of commercial union," understanding the latter to be, as he defines it, unrestricted interchange of products, with the enactment and enforcement of our tariff laws by Canada—presumably even against her sovereign Great Britain—is rather a protectionist's dream than the hope of a reasonable man.

With Mr. Blaine's conclusion that a great nation is bound to maintain its rights as a nation and to protect its citizens in their enjoyment of those rights, I fully concur, and it is exactly that which has been done in the proposed treaty. The proposed treaty is a careful specification of our rights, and it is not an attempt to appropriate the rights of others. The editorial in the Tribune commenting on Mr. Blaine's letter is startling. We have consistently advocated international arbitration; we have avoided foreign complications as far as possible; we have conducted ourselves with something approaching dignity among the nations ,and so little has our past history impressed the writer of the editorial that he is content to go on record as saying "retaliation in kind is the only method of redressing fishermen's wrongs that is consistent with the dignity of a great nation." If he will pardon the suggestion, the insertion of a "not" before the word "consistent" would be in accordance with the better view.

Regarding the question of the comparative loss or gain of privileges as between the Treaty of 1818 and the proposed treaty, it seems that the proposed treaty starts (see Article I.) on the basis of the Treaty of 1818, which, it must be always borne in mind, is the present existing criterion of our rights. It further appears that the first eight articles of the treaty provide simply for the manner of exactly specifying what the limits of our renunciation, made in general terms by the Treaty of 1818 are. Article II. provides for a commission to do the physical marking out of these limits on charts. Article III. provides in its first paragraph for the preservation of the records of such marking out. In the second paragraph it provides for a limitation of the headland theory to ten-mile spaces—concession favorable to us. Article IV. provides for ten exceptions—in favor of Great Britain—to that concession, heretofore shown to be reasonable exceptions. Article V. provides against claims which we might base on a technical construction of Article III. Articles VI., VII. and VIII. deal with the details of promulgation of the limits as ascertained, for an umpire in case of disagreement, and for the payment of the commissioners.

There is nothing in these first eight articles derogatory to the dignity of the United States or decreasing in any wise any privilege that we could claim under the Treaty of 1818. So far as these articles make the Treaty of 1818 more specific, their specifications are more advantageous to us than the supportable claims of Great Britain under the general terms of the Treaty of 1818 would be. They diminish the limits of territorial waters instead of expanding them. Article IX. (free navigation of the Straits of Canso) is a distinct concession by England from the claims heretofore made by her. That those claims were not proper and that the concession should have been made is true, and that Great Britain finally definitely concedes the point is to the credit of our representatives.

Article X. consists of three paragraphs: The first subjects our fishing vessels, when they enter bays or harbors within the prohibited limits, to the harbor regulations common to them and to Canadian fishing vessels. If any attempt should be made hereafter to construe this paragraph in any other sense than that our vessels shall not be required to conform to any harbor regulations which are not imposed on Canadian or Newfoundland fishing-vessels, it would be a manifest evasion of its spirit which should be promptly resented by us. It would doubtless have been preferable to express the intent of this paragraph more clearly had it not been that the other paragraphs of the article define advantageously to us what restrictions shall not be placed upon our vessels. Bearing in mind that by the Treaty of 1818 our rights to enter were restricted to shelter, repairing damages, purchasing wood, or obtaining water, we find that the second paragraph specifies that our vessels, when putting in for the purpose of shelter or repairing damages, need not report, enter,

or clear, nor need they do so when putting in for wood or water, except it be at some established port of entry. There is, however, a limitation as to the time which they may remain without making entry, to twenty-four hours exclusive of Sundays and holidays; also they may be "required to report, enter or clear" if they communicate with the shore, and it is stipulated that they shall give due information to boarding, i. e., Custom-house officers. The true intent of these exceptions is undoubtedly to prevent smuggling under the cover of fishing, and if attempted to be extended beyond this, such expansion should and doubtless would be resisted. The third paragraph enumerates certain immunities from the various forms of coastwise dues, such as pilotage, light-house, and similar charges, with a careful proviso that the enumeration shall not—on the principle of a recital of the one being the exclusion of the other—render us subject to any dues inconsistent with the intent of the Treaty of 1818, but omitted to be specified in this paragraph. If this article be faithfully carried out—and we have no right to assume that a friendly nation will not carry out its treaty pledges—it will inure to the distinct advantage of our fishermen, nor are the provisions for entry, etc., dissimilar to those which every nation enforces to protect its revenues from smugglers.

Article XI. has two paragraphs, of which the first permits unloading, transshipping, and selling of fish by our vessels, as well as replenishment of outfits, provisions and supplies, and shipment of crew in any Canadian port or harbor, where necessary as incident to refuge, repairing damages, or death and sickness respectively. In other words, it waives Canada's right to exclusive use of the advantage in the prosecution of the fisheries of a nearer base of supplies in cases where humanitarian principles are involved. The second paragraph places our returning fishing boats—their catch being completed—upon the basis of trading vessels, allowing us, in other words, to use Canada as a base of supplies for the home voyage, subject to the requirement—again in the nature of a police regulation—that we shall take out licenses, which are to be promptly granted without charge. But it very properly preserves the domestic markets to their own fishermen and coasters by prohibiting purchases on a basis of barter, or purchasing for resale or traffic, which, if our vessels be in fact fishermen, is a limitation without hardship. Article XII. secures in four lines reciprocal privileges in our waters to their fishing vessels, as to which adverse comment would hardly be justifiable.

Article XIII. provides for an official number of our fishing vessels for ease of identification by Canadian officials, to which no exception can be taken. Article XIV. consists of three paragraphs and provides that, for an infraction of Canadian rights by us, the offending vessel may be forfeited as well as her supplies and cargo. That penalties for preparation on the part of our vessels to commit such infractions shall be fixed by the court, but not be in excess of forfeiture. It fixes also a limit of $3 per ton of the offending vessel as the highest fine to be inflicted by the court for any other violation of the laws of Great Britain, Canada, or Newfoundland in regard to fishery, committed by our vessels within the prohibited waters, bays, creeks, or harbors. It is to be observed that if within the dominions of a foreign nation we commit an offence against its laws, we are bound to suffer such penalties as such nation's laws may provide for such offence. If such infraction of the law of a foreign country, going unpunished, would inure to the diminution of the exclusive rights of its citizens generally, we cannot complain if heavier penalties be imposed upon us as foreigners than are imposed upon particular subjects of the particular nation for like offences. The extreme limit for penalties ($3 per ton) is not a very large percentage of the value of a vessel. The second paragraph of the article is framed to prevent harassment and vexation of our vessels by their officials. It should be noted here that all judicial proceedings in such cases are before Courts of Admiralty (in Canada known as Vice-Admiralty Courts, as their authority flows from the English Court of Admiralty), and the Admiralty Courts have been accustomed, from the earliest times, to pass on questions involving the rights of foreigners and their protection against what might be termed the rapacity of the citizens and officials of the particular country. We need not, certainly before distinct evidence, anticipate unfair treatment in such courts. Moreover, it is quite as likely that the master of a fishing vessel which has been attempting to gain an undue advantage should on detection be a compound of "injured innocence" and "victimized foreigner," as it is that an Admiralty judge should be an oppressor. The provisions of the paragraph are for prompt and inexpensive trial at the place of detention unless the defence desires a change of venue. No security for costs is to be required unless bonds be given to answer the judgment and the vessel be removed. Provision that bonds reasonable in amount only shall be

required is made. The right to appeal is limited to the defendant, and on such appeal, lest his witnesses be scattered or for other reasons unavailable, he is entitled to use the evidence taken in the court below. Moreover, by the third paragraph, if the decree extends to forfeiture, it is not to be executed until it has been finally reviewed by the Governor-General of Canada in council or the Governor in Council of Newfoundland, as the case may be.

The fifteenth section of the treaty contains an offer to us of an ever-open option. If we should conclude that its privileges are worth our accepting its consequences, we are at liberty at any time to make it operative. It provides, in brief, that immediately on our admitting the products of the Canadian fisheries (except fish preserved in oil) free of duty, Canada shall do likewise, and so long as we shall continue so to do, our fishermen are to receive annual licenses free of charge permitting them to purchase provisions, bait, ice, tackle, supplies and outfits, also, to transship their catch by sea, rail, or otherwise, the sole limitation being that supplies shall not be obtained by barter, though bait may be so obtained. The concluding paragraph of the article provides for reciprocal privileges in the United States to Canadian fishing boats. It would seem fair to leave this question to be decided on a careful collection of evidence as to the value to our fishermen of the privilege of purchasing bait, etc., near the fishing grounds, and if they, being the interested parties, believe that facilities therefor and for transshipment of catch will offset the danger to them of Canadian competition in our markets, it would seem as though even the most rabid protectionists could hardly object to free trade in fish. The sixteenth and concluding section of the treaty provides merely for the manner of its ratification.

One word in support of my estimate of the British Admiralty Courts. The well-known case of the Anna [5 Rob. (C.) 373], was a capture by a British privateer made five miles from Balize Fort, off the mouth of the Mississippi, and two and a half to three miles to seaward from a collection of stranded logs lodged on a mud flat—the nearest thing that could be called land—and the captors sought a condemnation of the vessel as a prize before the English courts. Sir William Scott, in rendering his judgment, said that the conduct of the British privateer in standing off and on, off the mouth of the Mississippi and overhauling vessels there, was "an inconvenience which the States of America are called upon to resist, and which this court is bound on every principle to discourage and correct. The conduct of the privateer has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce that there has been a violation of territory * * * and that these acts of misconduct have been further aggravated by bringing the vessel to England without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the valid rights of America, and to the individuals who have sustained injury by such misconduct, if I do not follow up the restitution which has passed on the former day with a decree of costs and damages." And in another case [The Recovery, 6 Rob. (C) 341] the same learned judge said: "In the first place, it is to be recollected that this is a court of the law of nations. Though sitting under the authority of the King of Great Britain, it belongs to other nations as well as to our own, and what foreigners have a right to demand from it, is the administration of the law of nations merely, and to the exclusion of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable repugnance."

It seems fair to assume that the traditions of the Courts of Admiralty for the application of international law and equitable principles will be preserved as well to-day in fishery disputes, when under the scrutiny of a powerful interested nation, as they were by the same courts in regard to the vessels and rights of the same nation when it was of feebler strength. I fail to see, then, in a careful reading of the proposed treaty any point wherein the privileges secured by the Treaty of 1818 are diminlished, and I do find in it matter which is either distinct increase of privilege, or at least concession from the construction heretofore claimed by Great Britain for the Treaty of 1818. Further, there appears in it no restriction not within the police powers of a nation for the due protection of its revenues, nor any restriction dissimilar in spirit from those which we ourselves exercise to-day. If any point be made in regard to the so-called Canadian cruisers or marine police, a moment's thought will recall to your readers that the State of Maryland has been recently engaged in petty war, not unaccompanied with bloodshed, in regard to the taking of shell-fish in or about the Potomac or Chesapeake, and that no question appears to have been successfully raised as to the power of even a State, whose sovereignty is subject to such limitations as the Constitution of the United States imposes, to maintain similar armed vessels or marine po-

lice for such purposes. That special laws must be enacted to prevent an improper use of the facitities afforded by a pretence of carrying on fishing, for smuggling; reference to the Revised Statutes of the United States, sections 4131, 4311, 4320, 4321, 4335, 4364, 4365, and 4371 bear internal evidence to, providing as they do for the enrolment, license, and forfeiture for circumstances pointing towards an intention to smuggle, of our own fishing vessels by our own authorities. In conclusion it would seem that if the rights secured to us by this treaty, in connection with the Treaty of 1818, are promptly and properly enforced or protected by the Government, we shall have no cause for legitimate complaint. Which being so, it would follow that the treaty should be ratified, and the onus of exacting the faithful performance of its regulations from Great Britain be left, as in the case of every other treaty, in the hands of the Government. No form of words can of itself bind a foreign nation, nor would a self-respecting nation agree to any treaty which contained clauses insinuating an anticipation on the part of the other contracting Power that evasion would be attempted. The treaty seems succinct and concise, easy of understanding and application, and increasing instead of diminishing our rights or privileges. It is difficult, then, to see from whence other than factious opposition to ratification can arise. Very respectfully,

CHARLES STEWART DAVISON.

Ex. G.M.B.